

# CMBA LEGAL NEWS

presented by the CMBA Legal Services Committee

## NATIONAL SETTLEMENT TRIGGERS CA LEGISLATION

**Susan Milazzo**, EXECUTIVE DIRECTOR, CALIFORNIA MORTGAGE BANKERS ASSOCIATION



The beginning of Spring typically means the days get longer, the sun is out more often and baseball season starts. For the CMBA it also means that we've seen

the end of the bill introduction period for the State of California so we have a pretty good idea of what our lobbying program will look like for the year. Over one thousand bills were introduced just prior to the annual bill introduction period this year and CMBA will most likely be actively working on about 50 this year. This session kicked off with a very specifically outlined mission by the Senate and Assembly Leaders along with State Attorney General Kamala Harris to implement many aspects of the National Mortgage Servicing settlement agreement into state statute. At this writing, the settlement details haven't been announced but once that occurs, the spot bills (defined as legislation initially introduced on a general topic but are intended to later be amended to be specific to the desired issue) will be amended to incorporate key elements of the settlement.

The bills will likely include the following areas: requiring creditors to provide documentation to the borrower that establishes the creditor's right to foreclosure prior to filing notice of default; prohibiting creditors from recording a notice of default or sale when a loan modification application is pending; requiring creditors to provide a single point of contact for all information relative to a particular foreclosure; authorizing borrowers to challenge unlawful commencement of a foreclosure in court and impose a \$10,000 civil penalty on the recordation or filing of "robosigned" documents; requiring purchasers of foreclosed homes to honor the terms of existing leases and give rental tenants at least 90 days notice before commencing eviction; establishing a new \$25 fee to be paid by servicers upon recording a notice of default (fees deposited into a mortgage fraud prevention fund); and authorizing the Attorney General to impanel a special grand jury for the purposes of investigating and indicting multi-jurisdictional financial crimes against the state. Considering these are only one set of measures that will be introduced

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## Recorded Assignments of Deed of Trust are Misused and Misunderstood in “STOP FORECLOSURE” LAWSUITS

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“Foreclosure delay” lawsuits are well known to the mortgage lending industry and California courts in recent years. Some of these foreclosure delay

lawsuits involve theories relating to the recorded assignment of deed of trust. Recording an assignment may be helpful in providing public notice as to identity of the current owner of the

debt, and avoiding transfer tax at foreclosure. But recorded assignments have caused some confusion among courts, borrowers’ counsel and sometimes even lenders/servicers.

The legal effect of a recorded assignment is often misunderstood. An assignment normally has the appearance of a formal conveyance of an interest in property or transfer of a debt, invoking language like the owner “hereby grants, assigns, and transfers” to the assignee “all beneficial own-

ership in that certain deed of trust dated....” Not surprisingly, the document is widely – but incorrectly – believed to transfer the beneficial ownership in a deed of trust.

It doesn’t. The transfer of a debt secured by a deed of trust carries with it the security, without any formal assignment or delivery, or even mention of the security. (Civil Code §2936; *Carpenter v. Longan* (1872) 83 U.S. 271, 275.) The debt is transferred when the promissory note is deliv-

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ered to another for the purpose of giving the other person the right to enforce the instrument. (Commercial Code §3203(a).) The transferee is entitled to enforce the promissory note and security. (Commercial Code §3301.) Of course, it is well-established that the debt owner is not obligated to "prove" possession of the note to foreclose. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149.)

So whoever acquires the debt may foreclose on the security, without any separate assignment of deed of trust ever existing. Nonetheless, assignments are often executed and recorded in the public records, from which time they provide constructive notice of their contents. (Civil Code §2934.)

Borrowers' attorneys frequently comb through the recorded assignment in search of some purported defect to raise doubt about the validity of a foreclosure sale. One argument that we see with increasing frequency is that the assignment is improperly "back-

dated" because it was executed or recorded long after the debt was transferred.

Troublingly, this argument sometimes scores. For example, in one case filed in the U.S. District Court for Eastern California, the court denied the lender's motion to dismiss because the assignment was arguably defective. "While California law does not require beneficiaries to record assignments, the process of recording assignments with backdated effective dates may be improper, and thereby taint the notice of default." (*Ohlendorf v. Am. Home Mortgage Servicing*, No. Civ. S-09-2081 LKK/EFB, 2010 U.S. Dist. LEXIS 31098 (E.D.Cal. Mar. 31, 2010) (internal citation omitted).)

Borrowers have also argued that the assignment is defective because it lacks certain technical requirements applicable to a true conveyance of an interest in property of transfer of a debt.

None of this should matter. Under a deed of trust it is the trustee who holds title to the security and the right of sale, so the

only "standing" to foreclose that must be shown is a recorded substitution of trustee (if applicable) showing that the trustee of record conducted the sale. (See *Dimock v. Emerald Properties LLC* (2000) 81 Cal.App.4th 868.) And, as noted, neither the lender nor the trustee is obligated to "prove" beneficial ownership of the debt to foreclose.

For this reason the California Court of Appeal recently reaffirmed that there is no requirement that an assignment of deed of trust be recorded prior to foreclosure. (*Calvo v. HSBC Bank USA, N.A.* (2011) 199 Cal. App.4th 118.) But when a court senses that something is amiss when an assignment is recorded, the case may nonetheless make it past the pleadings and perhaps even to trial.

While the beneficial interest in the deed of trust has no bearing on the foreclosure process, recorded assignments are increasingly seen in foreclosure litigation.

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